No. 80-816

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF LOUISIANA,
Respondent,

versus

RICHARD JAMES BOURQUE,
Petitioner.

On Petition for Writ of Certiorari to
The Supreme Court of Louisiana

RESPONSE TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

The question here presented may be stated as follows:

> Does Title 14, Louisiana Revised Statute, Section 80, deny petitioner equal protection of the laws by virtue of its pronouncement that only males can be offenders and only females can be victims of the crime of carnal knowledge?

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Respondent, the State of Louisiana, hereby responds to the Petition for Writ of Certiorari filed on behalf of Richard James Bourque.

OPINION BELOW

The opinion of the Honorable Allen Babineaux, District Judge, 15th Judicial District Court in and for the Parish of Acadia, State of Louisiana, is included herein as Appendix A.

The Louisiana Supreme Court denied petitioner's application for supervisory writs without rendering a formal opinion. That denial being made on October 6, 1980 in docket number 80-K-1764 of that Court's records, which denial is unreported as of this date but included herein as Appendix B.

JURISDICTION

This Honorable Court's jurisdiction exists by virtue of Title 28, United States Code, Section 1257(3), which authorizes and allows this Court to review final judgments or decrees rendered by the highest court of a State where a State statute's validity is drawn in question as being repugnant to the Constitution of the United States. In the present case petitioner questions the constitutional validity of Title 14, Louisiana Revised Statute, Section 80, in view of United States Constitution, Amendment XIV, Section 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Louisiana State statute involved is Title 14, Louisiana Revised Statute, Section 80, which provides that:

"Carnal knowledge of a juvenile is committed when:

(1) A male over the age of seventeen has sexual intercourse with consent, with any unmarried female of the age of twelve years or more, but under the age of seventeen years, when there is an age difference of greater than two years between the two persons; or

(2) A person over the age of seventeen has anal or oral sexual intercourse, with consent, with a person of the age of twelve years or more, but under the age of seventeen years, when there is an age difference of greater than two years between the two persons.

Lack of knowledge of the juvenile's age shall not be a defense. Emission is not necessary; and penetration, however slight, is sufficient to complete the crime.

Whoever commits the crime of carnal knowledge of a juvenile shall be imprisoned, with or without hard labor, for not more than ten years."

United States Constitution, Amendment XIV, Section 1 is also involved and provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The facts of the case underlying the petition for certiorari are as follows: On April 25, 1980, petitioner was charged by bill of information with committing carnal knowledge of a juvenile in violation of the provisions of Title 14, Louisiana Revised Statute, Section 80. No bill of exception was filed on petitioner's behalf to determine whether or not the State of Louisiana was proceeding under Section 80(1) or 80(2). However, it is expressly conceded that the alleged criminal act of petitioner was a violation of the first sub part of that section, which sub part relates to natural sexual intercourse.

Petitioner filed a Motion to Quash on June 23, 1980, which motion alleged the same grounds as listed in his petition for certiorari with this Court. The motion was denied by the trial court by minute entry dated July 21, 1980. (See Appendix A)

Petitioner then applied for supervisory writs with the Louisiana Supreme Court on August 4, 1980, again alleging those same grounds. The application for supervisory writs was denied on October 6, 1980. (See Appendix B).

ARGUMENT

In the case of *State v. Bell*, 377 So.2d 303 (1979), included herein as Appendix C, the Louisiana Supreme Court was confronted with the same indentical issue with which this Honorable Court is now faced. In a well reasoned opinion, the Louisiana Court applied the test enunciated by this Court in *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), to the effect that gender class distinction ". . . statutes may withstand the equal protection examination if the gender classification serves important governmental objectives and is substantially related to achievement of those ends". (At page 306).

In applying that test to the *Bell* case, the Louisiana Supreme Court agreed that protection of juvenile females from the danger of pregnancy, from possible injury to their reproductive systems and from the possibility of lingering mental impairment were legitimate areas of state concern justifying the gender class distinction proscribed by the subject statute. The statute is not based upon archaic stereotypes as argued by petitioner, but is founded upon the promotion of ex-

tremely important and compelling governmental interests.

Therefore, it is clear that this issue involves a question of extreme national importance which should be decided by the Court. The California statute which is the subject of *Michael M. v. The Superior Court of Sonoma County, et al,* Docket No. 79-1344 of the records of this Court is, as stated by petitioner, quite similar and a decision regarding the constitutionality of that statute would possibly be equally controlling in the present case. However, it is respectfully suggested that this Honorable Court determine the constitutionality of both statutes in order to completely answer both ramifications of the issues before the Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a writ of certiorari should be granted in this case.

Dated: February ____, 1981.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that three copies of the foregoing Response to Petition for Writ of Certiorari to the Supreme Court of Louisiana, have been mailed, postage prepaid, addressed as follows:

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P.O. Drawer 688
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Crowley, LA 70526

I further certify that all parties required to be served have been served.

JACK DERRICK MILLER

APPENDIX A

15TH JUDICIAL DISTRICT COURT
PARISH OF ACADIA, LOUISIANA

STATE OF LOUISIANA

VERSUS

RICHARD JAMES BOURQUE

CRIMINAL DOCKET NO. 33,557

MINUTE ENTRY

The defendant, Richard James Bourque appears before this Court on his motion to quash a bill of information charging him with the act of carnal knowledge of a juvenile in violation of L.R.S. 14:80. The substance of defendant's argument is that the criminal statute in question discriminates on the basis of sex in that only males may be charged under part one of the statute, and therefore, this law is violative of defendant's right to equal protection of the law as provided in the Fourteenth Amendment of the Constitution of the United States and Article Three of the Louisiana Constitution of 1974.

It is the obligation of the Court to follow the decisions of the Supreme Court of this State; the ruling

in *State v. Bell*, 377 So.2d 303 (1979) is considered by this Court to be binding authority on the issue of the constitutionality of L.R.S. 14:80. A statute may create classes which result in their different treatment when it furthers a compelling state interest and is drawn in the least restrictive manner possible:

> "We share the view that protection of young females from pregnancy, from possible injury to their reproductive systems as well as the possibility of lingering mental impairment, is a legitimate area of state concern justifying the sex classification involved in subject statute."

Accordingly, defendant's motion to quash the bill of information is denied. All costs of these proceedings shall be borne by defendant.

Lafayette, Louisiana this 21st day of July, 1980.

/s/ ALLEN M. BABINEAUX
DISTRICT JUDGE

Filed: July 24, 1980

/s/ MARK MYERS, JR.
DEPUTY CLERK OF COURT
ACADIA PARISH, LA.

APPENDIX B

THE SUPREME COURT OF THE
STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS No. 80-K-1764

RICHARD JAMES BOURQUE

In Re: Richard James Bourque, applying for supervisory writs, Parish of Acadia, Number 33,557.

October 6, 1980

Denied.

PFC
JAD
WFM
FAB
JCW
HTL

Supreme Court of Louisiana
October 6, 1980

/s/ FRANS J. LaBRANCHE, JR.
Clerk of Court
For the Court

APPENDIX C

SUPREME COURT OF LOUISIANA

STATE of Louisiana

versus

Jeffrey Wayne BELL

STATE of Louisiana

versus

Felton ROBERTS

Nos. 64574, 65227

November 12, 1979

LANDRY, Justice Ad Hoc.

These consolidated cases involve constitutional attack on L.S.A.-R.S. 14:80, commonly known as the Louisiana carnal knowledge of a juvenile law, on ground that the statute sanctions sex discrimination proscribed by La. Const. 1974, Article 1, Section 3, and also violates the equal protection clauses of La. Const. 1974, Article 1, Section 3, and the fourteenth amendment to the United States Constitution.

In *Bell*, defendant's motion to quash a bill of information charging violation of subject statute, was denied in the trial court finding that the statute meets the constitutional challenge. We granted certiorari to review this determination. In *Roberts*, defendant's motion to quash a bill of information charging violation of subject statute was sustained and the State has appealed. Because the cases produced opposite holdings on the same issue, they have been consolidated for disposition by this court.

L.S.A.-R.S. 14:80, as amended by Acts 539 of 1977 and 757 of 1978, now provides:

> "§80. Carnal knowledge of a juvenile
> Carnal knowledge of a juvenile is committed when:
>
> (1) A male over the age of seventeen has sexual intercourse, with consent, with any unmarried female of the age of twelve years or more, but under the age of seventeen years, when there is an age difference of greater than two years between the two persons; or
>
> (2) A person over the age of seventeen has anal or oral sexual intercourse, with consent, with a person of the age of twelve years or more, but under the age of seventeen years, when there is an age difference of greater than two years between the two persons.

> Lack of knowledge of the juvenile's age shall not be a defense. Emission is not necessary; and penetration, however slight, is sufficient to complete the crime. Whoever commits the crime of carnal knowledge of a juvenile shall be imprisoned, with or without hard labor, for not more than ten years."

Prior to the aforesaid recent amendments, subject statute pertinently stated:

> §80. Carnal knowledge of a juvenile
> Carnal knowledge of a juvenile is committed when anyone over the age of seventeen has sexual intercourse, with her consent, with any unmarried female person of the age of twelve years or over, but under the age of seventeen years. Lack of knowledge of the female's age shall not be a defense. Emission is not necessary; any sexual penetration, however slight, is sufficient to complete the crime.
>
> Whoever commits the crime of carnal knowledge of a juvenile shall be imprisoned, with or without hard labor, for not more than five years."

Defendant Bell maintains that the trial court erred in failing to find that the statute arbitrarily, capriciously and unreasonably discriminates against males because it provides that only males can be offenders and only

females can be victims of the conduct proscribed therein. The State contends the sex discrimination involved meets the constitutional test of legitimate class differentiation.

La. Const. 1974, Article 1, Section 3, states:

> "§3. Right to Individual Dignity
> Section 3. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime."

It readily appears that Article 1, Section 3, above, proscribes both discrimination on account of sex and denial of equal protection of the laws to the citizens of this state. The fourteenth amendment to the United States Constitution guarantees all the fundamental right of equal protection of the laws.

Notwithstanding the equal protection clauses of the Federal and state constitutions, a statute may create classes for which different treatment is prescribed, provided equal protection requisites are satisfied. *City of*

New Orleans v. Dukes, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976).

In dealing with equal protection challenges to constitutionality, the Supreme Court of the United States had traditionally employed the rule of strict scrutiny in the so called "suspect classes" such as race, franchise and violation or infringement of fundamental constitutional rights. In such instances, the rule is that to survive strict scrutiny, the statute must further a compelling state interest and be drawn in the least restrictive manner possible. *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

On the other hand, "mere rationality" is the test applied in cases involving classes not embraced within the "suspect" categories. In these instances, equal protection requirements are deemed fulfilled if a rational basis is found for opting a particular means of achieving or promoting a legitimate state end, such as economic regulation. *City of New Orleans v. Dukes*, above.

In dealing with classification predicated on gender, although such classification was not found to be inherently suspect, the United States Supreme Court has decreed that the statute must meet a higher standard than rationality of economic regulation. We refer to *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) which involved an Oklahoma statute prohibiting sale of non-intoxicating 3.2 beer to males below age 21, but which also allowed the sale of the

same beverage to females 18 years of age or older. Although the statute was stricken because an insufficient showing was made to support a class distinction for regulating drinking, the court found, nevertheless, that such statutes may withstand the equal protection examination if the gender classification serves important governmental objectives and is substantially related to achievement of those ends. See also *Califano v. Webster*, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977); *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979).

Similar attacks on carnal knowledge of juvenile statutes and statutory rape statutes of other jurisdictions have resulted in only one instance in which laws have been held invalid for sex discrimination, namely, *Meloon v. Helgemoe*, 436 F.Supp. 528 (D.C.), affirmed 564 F.2d 602, 1st Cir. 1977, cert. den. 436 U.S. 950, 98 S.Ct. 2858, 56 L.Ed.2d 793 (1978), which involved New Hampshire's statutory rape law.

Numerous other jurisdictions, however, have rejected the *Meloon* rule, which, inter alia, rejected the principle that the state's interest in preventing pregnancy among young females was not a valid state objective. In *State v. Brothers*, Del. Super., 384 A.2d 402 (1978) the court expressly declined to follow *Meloon's* rejection of the concept that prevention of pregnancy in young females was not a legitimate state interest.

State v. Thompson, 162 N.J.Super. 302, 392 A.2d 678 (1978) sustained the validity of a New Jersey statute providing that only males could commit the offense of carnal knowledge of a juvenile, even though the statute did not require penetration as an essential element of the offense.

In *State v. Rundlett*, Me., 391 A.2d 815 (1978), Maine's Supreme Court found that Maine's gender based statutory rape law served an important governmental objective, was substantially related to the objective sought to be attained and was therefore, valid.

The rationale of *Brothers*, *Thompson* and *Rundlett*, is that the state has a valid interest and objective in deterring male intercourse with young females because of the inherent danger of pregnancy to the female, which danger does not exist in those instances where the male is victim of a similar offense. The decisions also recognize and point to the greater possibility of harm to the young female resulting from penetration of the vagina by the male sex organ. We add that common judgment recognizes the possibility of lingering mental damage and neurosis is far more likely to occur in the case of a female victim than in that of a male victim.

We find the reasoning of those jurisdictions which have upheld the validity of similar statutes, to be sound. We share the view that protection of young females from pregnancy, from possible injury to their reproductive systems as well as the possibility of

lingering mental impairment, is a legitimate area of state concern, justifying the sex classification involved in subject statute.

In recent decisions we have considered gender-classed sex offense statutes and upheld their validity against the charge of discrimination and denial of equal protection of the law constitutional guarantees. In *State v. Hollins,* 375 So.2d 922 (La. 1979) we upheld La. R.S. 14:86 which dealt with the offense of enticing minors into prostitution. In *State v. Fletcher,* 341 So.2d 340 (La. 1976), the Louisiana aggravated rape statute was held to be non-discriminatory against males even though females could not be prosecuted for rape. In *State v. Devall,* 302 So.2d 909 (La. 1974), we sustained validity of a statute providing that only females could be prosecuted for prostitution.

Appellant Bell points to recent revisions in L.S.A.-R.S. 14:86 as amended by Act 434 of 1978, which now provides that females may be guilty of enticing minors into prostitution. Said appellant also notes revision of L.S.A.-R.S. 14:42, which currently provides that females may be guilty of aggravated rape, as amended by Act 239 of 1979. Finally, said appellant notes L.S.A.-R.S. 14:82, as amended by Act 49 of 1977, pursuant to which males may be prosecuted for prostitution. It is Bell's contention that these recent statutory amendments indicate legislative intent to terminate all sex differentiation and discrimination in sex offense statutes.

We find no merit in the foregoing contention. We note that L.S.A.-R.S. 14:80(1) as recently amended, makes it an offense only for a male to have intercourse with a female within the designated juvenile bracket. It is significant that L.S.A.-R.S. 14:80(2), now makes it an offense for a female as well as a male to have anal or oral intercourse with a male or female victim within the designated age bracket. It appears obvious that the legislature has carefully considered the difference between natural intercourse by an adult male with a young female and unnatural (anal or oral) intercourse by an adult male or female with a juvenile male or female victim. It is evident that the unnatural intercourse proscribed in paragraph (2), above, does not involve the danger of pregnancy of the female victim or danger of harm to the reproductive organs of either the male or female victim. In amending 14:80, above, the legislature had the benefit of our prior decisions in the area. Had the legislature intended to abolish the gender based classification of L.S.A.-R.S. 14:80(1) it could have easily done so at the same time it eliminated such classification from paragraph (2). We can conclude only that the legislature found an underlying compelling concern for the welfare of the state's young female citizens sufficient to justify the general classification continued in L.S.A.-R.S. 14:80(1).

Defendants make the final argument that equal protection mandates equal treatment. In support of this contention they rely upon *Sumrell v. York*, 288 F.Supp. 955 (Dist. Conn. 1968); *Commonwealth v. Daniel*,

430 Pa. 642, 243 A.2d 400 (1968); *Commonwealth v. Stauffer*, 214 Pa. Super. 113, 251 A.2d 718 (1969). We find these cases factually inapposite. In *Sumrell*, above and *Daniel*, above, statutes were declared invalid because they imposed different penalites on males and females for the same offense. In *Stauffer*, above, the statute provided a penalty of confinement in the county jail. The sentencing of a female to penitentiary imprisonment was held to violate equal protection guarantees.

The judgment rendered in *State v. Bell*, Number 64,-574, is affirmed and this matter remanded to the trial court for further proceedings consistent with the views herein expressed.

In *State v. Roberts*, Number 65,227, the judgment of the trial court quashing the bill of information charging defendant with carnal knowledge of a juvenile, is reversed and set aside and this matter remanded to the trial court for further proceedings consistent with the views herein expressed.

CALOGERO, J., concurs, agreeing with the majority that R.S. 14:80 violates neither the Louisiana Constitution's equal protection clause, nor the Fourteenth Amendment to the United States Constitution.

MARCUS, J., concurs and assigns reasons.

MARCUS, Justice (concurring).

I agree with the majority that protection of young females from pregnancy, from possible injury to their reproductive systems, and from the possibility of lingering mental impairment is a legitimate area of state concern justifying the sex classification involved in La. R.S. 14:80. However, I disagree with the statement of the majority that La. Const. art 1, §3 proscribes discrimination on account of sex to the citizens of this state. Discrimination on account of sex is not so proscribed. The third sentence of section 3 states: "No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, *sex*, culture, physical condition, or political ideas or affiliations." (Emphasis added.) This sentence delineates the limitation on the power of the state to discriminate by law against persons of specified classes, including members of either sex. The limitation imposed does not absolutely preclude the legislature from defining the range of persons affected by legislation according to the various classes listed in the section; rather, it proscribes arbitrary, capricious, or unreasonable definition of those affected according to classes. If the discrimination that results from the legislative classification is found to be within reason, the statute does not violate this constitutional provision. Accordingly, I respectfully concur.

CALOGERO, Justice, concurring.

I agree with the majority that R.S. 14:80 violates neither the Louisiana Constitution's equal protection clause (Article 1, §3) nor the Fourteenth Amendment to the United States Constitution.